87-1407

No. -

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF PHILADELPHIA and
COMMISSIONER, PHILADELPHIA DEPARTMENT
OF PUBLIC PROPERTY,

Petitioners

v.

DISABLED IN ACTION OF PENNSYLVANIA,
on behalf of its members, and
HUGH YOUNG, JOHN DEANGELO, JAMES FALLS,
MICHAEL LOHR, DENA SCOTT, WALTER PLACE,
STEPHEN MARGOLIS, JOYCE BROCK, and
WENDY ELLIOTT-VANDIVIER, on behalf of
themselves and all others similarly situated,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SEYMOUR KURLAND
City Solicitor
SUSAN SHINKMAN
Divisional Deputy City Solicitor
STEVEN K. LUDWIG
Assistant City Solicitor
Law Department
City of Philadelphia
15th Floor
Municipal Services Building
Philadelphia, PA 19102
(215) 686-5270
Counsel for Petitioners

QUESTIONS PRESENTED

1. Did the court below improperly substitute its own view for that of the Secretary of Transportation concerning the appropriate interpretation of the regulations regarding handicap accessibility to public transportation facilities?

2. Is a recipient of federal funds for the renovation of a fixed subway facility required under Section 504 of the Rehabilitation Act of 1973 to make that particular facility accessible to the handicapped when the facility has not been accessible and there has been a local determination to satisfy accessibility requirements through alternate transportation systems?

LIST OF ALL PARTIES

Petitioners:

CITY OF PHILADELPHIA
COMMISSIONER, PHILADELPHIA DEPARTMENT OF PUBLIC PROPERTY*

Respondents:

DISABLED IN ACTION OF PENNSYLVANIA
HUGH YOUNG
JOHN DEANGELO
JAMES FALLS
MICHAEL LOHR
DENA SCOTT
WALTER PLACE
STEPHEN MARGOLIS
JOYCE BROCK
WENDY ELLIOTT-VANDIVIER

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*Dudley R. Sykes, who was a party in the proceeding below in his official capacity as Commissioner, Philadelphia Department of Public Property, no longer holds that office. Pursuant to Supreme Court Rule 40.4, his successor, Benjamin F. Ellis, Jr., is being described in his official capacity.

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No. -

In the Supreme Court of the United States

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CITY OF PHILADELPHIA and
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DISABLED IN ACTION OF PENNSYLVANIA,
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HUGH YOUNG, JOHN DEANGELO, JAMES FALLS,
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themselves and all others similarly situated,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The City Solicitor, on behalf of the City of Philadelphia and the Commissioner of Public Property, hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (App. A-1—17) is reported at 833 F.2d 1113 (1987). The memorandum and order of the United States District Court for the Eastern District of Pennsylvania (App. A-19—33) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 23, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

THE STATUTORY AND REGULATORY PROVISIONS INVOLVED ARE SET FORTH IN THE APPENDIX

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794	App. A-34
49 C.F.R. § 27.67	App. A-34—35
49 C.F.R. § 27.77	App. A-35—37
44 Fed. Reg. 31449 (1979)	App. A-37—38

STATEMENT OF THE CASE

This case involves conflicting interpretations of the federal regulations which set forth the obligations of recipients of federal funds to make mass transit facilities accessible to the handicapped.

Statutory and Regulatory Scheme

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (App. A-34), provides in pertinent part that no "otherwise qualified handicapped individual" shall:

> . . . [S]olely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .

It further provides that the head of each such federal agency receiving assistance shall promulgate his/her own implementing regulations.

The Department of Transportation's implementing regulations are found at 49 C.F.R. Part 27, "Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefitting from Federal Financial Assistance." The 1981 regulations regarding new facilities and alterations, 49 C.F.R. § 27.67, and regarding accessibility in mass transit, 49 C.F.R. § 27.77, are reproduced in the Appendix to this petition (App. A-34—37). The 1979 regulations, which had applied to accessibility requirements in mass transit, §§ 27.85-27.93, were deleted in 1981.

Facts

Mass transportation in the City of Philadelphia (Philadelphia) is provided by the Southeastern Pennsylvania Transportation Authority (SEPTA) through public bus, trolley, subway, elevated, and commuter rail systems. SEPTA has determined to satisfy the requirements of federal law to provide transportation to handicapped persons by concentrating on paratransit, a system using special, wheelchair lift-equipped, vehicles

for door-to-door reserved rides, rather than retrofitting the subway system to make it accessible.

The City of Philadelphia owns the Columbia Avenue underground station and leases it to SEPTA. In 1979 Philadelphia applied for a grant from the Urban Mass Transit Administration (UMTA) to renovate the Columbia Avenue station which was opened in 1928. Columbia Avenue is one of twenty-two (22) stations on the Broad Street line, none of which has been made accessible to wheelchairs. Following revision in 1981 of the Department of Transportation (DOT) regulations on handicap access to mass transit, 49 C.F.R. Part 27, Philadelphia notified UMTA of its intent to delete an elevator from the plans for the northbound side, and was informed:

> Since it is this Administration's view that the method of compliance with Section 504 of the Rehabilitation Act of 1973 is a matter of local preference and since the City has filed its certification of compliance with the "Special Efforts" requirements published in the federal register on July 20, 1981, your decision to make this change can be made without UMTA's approval.

(Letter of December 14, 1981, from UMTA Director, Office of Engineering, to City of Philadelphia, Chief Transit Engineer). The project was completed without an elevator.

Proceedings Below

Plaintiffs, Disabled in Action of Pennsylvania and nine individuals, filed a class action complaint against the City of Philadelphia and the Commissioner of Public Property, alleging the Defendants had violated Section 504 (App. A-34); 49 C.F.R. §§ 27.67(a) and (b) (App. A-34—35); § 165 of the Federal-Aid Highway Amendments of 1974, 23 U.S.C. § 142 note; § 16(a) of the Urban Mass Transit Act, *as amended* by § 317(c) of the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 1612(a), (d) and 42 U.S.C. § 1983. Jurisdiction was based on 28 U.S.C. §§ 1331, 1337, and 1343.

The district court certified the class and granted Phila-

delphia's Motion for Summary Judgment, finding it had not violated Section 504 and had satisfied the "special efforts" for the handicapped requirements of 49 C.F.R. Part 27 through expenditures for paratransit. The court denied the Plaintiffs' Motion for Partial Summary Judgment. (App. A-19—33).

The Plaintiffs appealed pursuant to 28 U.S.C. § 1291. The DOT submitted an *amicus curiae* brief to the Third Circuit, setting forth its interpretation of the regulations, 49 C.F.R. Part 27, as they applied to the Columbia Avenue station (App. A-39—54). It specifically interpreted its regulations on accessibility of facilities, 49 C.F.R. 27.67 (App. A-34—35) as not requiring the City to install an elevator since the facility had never had an elevator. The DOT further took the position that the district court reached the correct result, but was in error when it held that compliance with the "special efforts" requirement itself assured compliance with the regulations regarding accessibility of transportation facilities.

The Third Circuit rejected DOT's interpretation of its regulations to the effect that Philadelphia was not required to install an elevator at a facility which had never had an elevator. Citing the "cumulative effect of the applicable regulations" (App. A-16), it found the city was required to make an entrance to the northbound terminal of the Columbia Avenue station accessible and remanded for further evidence of the feasibility of making a southbound entrance accessible.

REASONS FOR GRANTING THE WRIT

This case presents important questions about the duties and responsibilities of all local authorities who receive federal funds to renovate existing facilities, to make them handicap accessible when alternative service is provided. It presents conflicting interpretations of the DOT's regulations in a situation where predictability of responsibilities is crucial to the many recipients of federal funds. In order to resolve the conflict in the interpretation of those regulations between the Third Circuit and the Secretary of Transportation, the Writ of Certiorari should be granted.

1. The Third Circuit Erroneously Refused To Follow The Department Of Transportation's Interpretation Of Its Own Regulations.

The issue presented in this case was whether the DOT's regulations, which implemented Section 504, required the City of Philadelphia to make the Columbia Avenue subway station accessible when it performed renovations with federal funds. The DOT participated as *amicus curiae* on appeal and interpreted 49 C.F.R. Part 27 as it applied to the Columbia Avenue subway station (App. A-39—54). Although the Third Circuit indicated that DOT's interpretation would be given controlling weight unless plainly erroneous or inconsistent with the regulations (App. A-9), the court disregarded DOT's interpretation.

The DOT, which had a full description of the Columbia Avenue renovation project before it, interpreted 49 C.F.R. 27.67 (App. A-34—35) as not requiring installation of an elevator at the Columbia Avenue station:

> . . . the more reasonable interpretation, and that adopted by DOT, requires that when renovating a means of access, such as a staircase, then the staircase must comply with the ANSI [American National Standards Institute] staircase standard, but the ANSI standard, as incorporated into DOT's regulations, do not require inclusion of

> an elevator shaft to an existing, fixed subway station which does not already have an elevator.

(Memorandum of Points and Authorities in Support of the United States Department of Transportation's Motion to Participate as Amicus Curiae, p. 16 (App. A-51))

The DOT explained its position by pointing to the preamble, published when the regulations had been introduced in 1979:

> . . . It should be noted that [49 C.F.R. 27.67(b)] applies only to the altered portion or item of a fixed facility. Thus, a stair renovation to meet the ANSI [American National Standards Institute] standard does not impose a requirement for elevator installation since an elevator is not within the scope of the stair alteration project. [49 C.F.R. 27.67(b)] *does not create the obligation to install an elevator in an existing fixed facility which has no elevator*. . . .

44 Fed. Reg. 31449 (1979) (emphasis added). (App. A-37—38). Since the Columbia Avenue station had no elevator prior to its renovation, DOT concluded that there was no obligation under the regulations to include one. The court of appeals refused to follow this interpretation, substituting for the DOT's interpretation, what it believed to be the "cumulative effect of the applicable regulations." (App. A-16).

The court of appeals erred by not applying the appropriate standard when reviewing an agency's interpretation of its own regulations. This Court has repeatedly held that an agency's interpretation of its own regulations is entitled to substantial deference. *Blum v. Bacon*, 457 U.S. 132, 141 (1982); *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). Furthermore, the agency's interpretation should be sustained even if it is not the only permissible construction, as long as it is rational. *Chemical Manufacturers Association v. Natural Resources Defense Council, Inc.*, 470 U.S. 116 (1985). Even if the statute at issue is silent or ambiguous, a court may not substitute its own construction of a statutory provision for a reasonable inter-

pretation made by the administrator of an agency. *Young v. Community Nutrition Institute*, 476 U.S. 974 (1986).

In this case, the court did not even have to speculate about the DOT's interpretation or how it might resolve the particular facts before it. The DOT offered its interpretation of 49 C.F.R. Part 27 as it applied to the Columbia Avenue station. Yet, without finding that interpretation arbitrary, inconsistent, or erroneous, the court refused to follow it.

Not only is the Third Circuit's failure to follow the appropriate standard a clear error, it serves to promote a lack of predictability since the court chose to follow the DOT's interpretation of the "special efforts" requirement in one instance, yet chose to ignore the DOT's interpretation of the ANSI standards in another. The decision leaves the City of Philadelphia, as well as other municipalities, without the guidance they have reason to expect from a federal administrative agency.

2. The Third Circuit's Decision To Require The City To Make A Subway Station Accessible, When Neither That Station, Nor The Subway System Has Been Made Accessible, Infringes Upon A Local Policy Determination, Contrary To Section 504, As Well As The Department Of Transportation Regulations.

The Third Circuit's interpretation of Section 504 and the DOT regulations requires Philadelphia to make at least the northbound side of a subway station accessible[1], even though the station itself has never been accessible and there has been a local policy determination to provide alternative service to wheelchair bound individuals. This ruling imposes a change in the mass transit program itself and is contrary not only to the DOT regulations implementing Section 504, but decisions

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1. The Court remanded for a determination of whether it would be feasible to require the southbound side of the subway station to be made accessible.

regarding the requirements of Section 504 in other areas as well.

This Court has made it clear in other contexts that Section 504 does not require the recipients of federal funds to make changes, modifications, or adjustments to existing programs that would constitute fundamental alterations in the nature of the program at issue. *Southeastern Community College v. Davis*, 442 U.S. 397, 412 (1979); *Alexander v. Choate*, 469 U.S. 287, 300 (1985); *School Board of Nassau County v. Arline*, ___ U.S. ___, 107 S.Ct. 1123, 94 L.Ed.2d 307, n.17 (1987). The DOT regulations implementing Section 504 have evolved consistent with those guidelines.

In 1979, the DOT promulgated regulations, pursuant to Section 504, requiring that transit systems receiving any federal funds make each mode of public transportation "accessible" to the handicapped by May 31, 1982. *See* 44 Fed. Reg. 31442 (1979). Among other requirements, subway and other rail systems were to be retrofitted with elevators and gap-closing equipment that would enable wheelchair users to board trains. 44 Fed. Reg. 31478-79.

The 1979 regulations were immediately challenged, resulting in the decision in *American Public Transit Association v. Lewis*, 655 F.2d 1272 (D.C. Cir. 1981) ("*APTA*"). The court found that Section 504 did not require the extensive modifications, including the addition of elevators to existing subways, that were mandated by the 1979 regulations. It relied on this Court's holding in *Southeastern Community College v. Davis*, *supra*, that Section 504 bans discrimination, but does not mandate affirmative action to accommodate the handicapped. Accordingly, the *APTA* court found the regulations requiring such modifications beyond the scope of Section 504 and remanded the case to the DOT.

After receiving the *APTA* decision, the DOT revised its regulations. These 1981 regulations required recipients of federal funds to make "special efforts" in their service area to provide mass transportation to handicapped persons, rather than "mainstreaming" or achieving a systemic goal of accessibility by a certain date. 49 C.F.R. 27.77. (App. A-35—37).

The regulation at issue here, 49 C.F.R. 27.67 (App. A-34—35), regarding facilities and alterations, remained the same.

The direction and intent of the DOT regulations has been to allow local authorities to develop their own programs for providing services to handicapped persons. The court of appeals' decision serves to impose a requirement on Philadelphia to change the nature of its program by requiring inclusion of an accessible subway system. The court has imposed this requirement despite the local determination to use other means, primarily paratransit, to provide transportation to handicapped persons; and despite the DOT's stated position that its regulations do not require such action. The decision creates obligations which are inconsistent with the purpose DOT intended to achieve when it revised its regulations in 1981.

3. Unless Reversed, The Third Circuit's Decision Will Have Significant Adverse Practical Consequences.

The practical effect of the court of appeals' decision is to require municipalities to spend federal funds in an unprogrammed and haphazard way. Regardless of whether an existing, fixed facility has an elevator or is part of an accessible system, installation of an elevator will be required when using federal funds for renovation. In effect, whenever the entrance to a subway facility is being renovated, the financially burdensome task of installing an elevator shaft will have to be undertaken.

The facts of this case are striking, but by no means unique. Philadelphia has an old subway system with twenty-two (22) individual stations, none of which includes an elevator. Requiring it to expend the limited funds available to put an elevator at the Columbia Avenue station, possibly only on one side, will serve no purpose. If retrofitting the entire system were required by the DOT regulations, or if it were part of the city's program for providing mass transportation to handicapped persons, installing the elevator would have some purpose. But in this situation, where the local authorities have

decided to concentrate their efforts on a paratransit system, it is a futile act, mandated by a single court overriding the administrative agency with the expertise in the area.

The problem for other municipalities which receive federal funds to renovate existing facilities is obvious. They should be able to rely upon the DOT's interpretation of its regulations, limiting the obligation to install an elevator in fixed facilities to those which already have one. If the Third Circuit decision is allowed to stand, it will expand that obligation in an undefined and financially burdensome way. The municipalities receiving federal funds for mass transportation should not be required to operate in such an uncertain environment.

CONCLUSION

For all of the foregoing reasons, the Writ of Certiorari should be granted.

Respectfully submitted,

SEYMOUR KURLAND
City Solicitor

SUSAN SHINKMAN
Divisional Deputy City Solicitor

STEVEN K. LUDWIG
Assistant City Solicitor

Counsel for Petitioners

Appendix

Appendix A—Opinion, Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1021

DISABLED IN ACTION OF PENNSYLVANIA, on behalf of its members, and YOUNG, HUGH; DEANGELO, JOHN; FALLS, JAMES; LOHR, MICHAEL; SCOTT, DENA; PLACE, WALTER; MARGOLIS, STEPHEN; BROCK, JOYCE; AND ELLIOTT-VANDIVIER, WENDY on behalf of themselves and all others similarly situated,

Appellants

vs.

SYKES, DUDLEY R., Commissioner, Philadelphia Department of Public Property, and CITY OF PHILADELPHIA

Appeal from the United States
District Court for the
Eastern District of Pennsylvania
(D.C. Civil No. 86-2316)

Argued
August 3, 1987
Before: SEITZ, MANSMANN and GREENBERG,
Circuit Judges.
(Filed November 23, 1987)

Stephen F. Gold, Esq. (Argued)
1315 Walnut Street
Suite 1632
Philadelphia, PA 19107
COUNSEL FOR APPELLANTS

Susan Shinkman, Esq. (Argued)
Divisional Deputy City Solicitor
City of Phila. Law Dept.
1530 Municipal Services Bldg.
Philadelphia, PA 19102-1692
COUNSEL FOR APPELLEES

William Kanter, Esq.
Mark W. Pennak, Esq.
Attorneys
Appellate Staff
Civil Division, Room 3617
Department of Justice
Washington, D.C. 20530-001
COUNSEL FOR UNITED STATES,
Department of Transportation

OPINION OF THE COURT

MANSMANN, *Circuit Judge.*

This action involves the interpretation of federal regulations setting forth the extent of the obligation of recipients of federal funds for renovation of mass transit facilities to make those facilities accessible to handicapped persons. After careful review of the regulations and the cited authorities and in light of the interpretation of its regulations by the United States Department of Transportation ("the DOT") subsequent to the district court's decision, we hold that compliance by the City of Philadelphia and the Southeastern Pennsylvania Transportation Authority ("SEPTA") with the "special efforts"

requirements of the DOT regulations as set forth in Section 27.77 of the former regulations, 49 C.F.R. 27.77 (1981), did not excuse compliance with the accessibility requirements of 49 C.F.R. 27.67(b) (1985) in connection with renovations to the Columbia Avenue subway station, which serves Temple University in Philadelphia.

Therefore, we will vacate the district court's order granting summary judgment for the defendants because the order was based solely upon the conclusion that the defendants had complied with the "special efforts" requirements as a matter of law. Furthermore, we will reverse the order denying partial summary judgment for the plaintiffs and remand for entry of an order granting partial summary judgment in favor of the plaintiffs as to the defendants' duty, in compliance with the regulations, to make the northeast entrance to the Columbia Avenue subway station's northbound terminal usable by persons in wheelchairs.

I.

In 1979, the DOT enacted regulations entitled "Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefitting from Federal Financial Assistance."[1] 49 C.F.R. Part 27 (1979). The 1979 regulations were promulgated to comply with U.S. Department of Health, Education and Welfare coordination guidelines, issued in 1978, implementing Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 ("Section 504"). These HEW guidelines required that all recipients of federal funds integrate handicapped persons into the same programs available to others, rather than treat them as a separate group in "special" programs. *See* 45 C.F.R. § § 85.1-85.58 (1980). Subpart C of the 1979 DOT

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1. These regulations were enacted pursuant to Section 16(a) of the Urban Mass Transportation Act, 49 U.S.C. § 1612(a), Section 165(b) of the Federal-Aid Act, 23 U.S.C. § 142 note and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. 44 Fed. Reg. 31442 (1979). These regulations superseded the 1976 Urban Mass Transportation Administration ("UMTA") regulations, codified at 49 C.F.R. Part 609. *Id.* at 31454.

regulations, 49 C.F.R. Part 27 (1979), which dealt with the accessibility of facilities, stated that it:

> does not necessarily require a recipient to make each of its existing facilities or every part of an existing facility accessible to and usable by handicapped persons.

49 C.F.R. § 27.65(a).

However, Subpart C did require that:

> Each facility or part of a facility which is altered by, on behalf of, or for use of a recipient . . . in a manner that affects or could affect the accessibility of the facility or part of the facility shall, to the maximum extent feasible, be altered in such a manner that the altered portion of the facility is readily accessible to and usable by handicapped persons.

49 C.F.R. 27.67(b).

Subparts D and E of these regulations imposed additional program-specific requirements regarding the accessibility of facilities and services. Subpart D contained program-specific requirements for airports, railroads and highways. Subpart E, which contained requirements pertaining to mass transportation, specifically required that stations within the rapid and commuter rail systems which served institutions of higher learning, such as the Columbia Avenue subway station,[2] "must be accessible to wheelchair users." 49 C.F.R. 27.87(a) (1979).

One month after the 1979 regulations were promulgated, suit was filed challenging the validity of Subpart E of these regulations. *American Public Transit Association v. Goldschmidt*, 485 F. Supp. 811 (D.D.C. 1980), *rev'd*, 655 F.2d 1272 (D.C. Cir. 1981) (*"APTA"*). The Court of Appeals for the D.C. Circuit, referring to the Supreme Court's decision in *Southeastern Community College v. Davis*, 442 U.S. 392 (1979),

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2. The Columbia Avenue subway station serves Temple University. *Disabled in Action v. Sykes*, Civil Action No. 86-2316 Memorandum Opinion, p. 1 (E.D. Pa. 1986).

held that because Subpart E of the DOT's regulations could be read to require extensive modifications of existing systems and impose extremely heavy financial burdens on local transit authorities, the regulations exceeded the DOT's authority to enforce Section 504. *APTA*, 655 F.2d at 1280. The court remanded the case to the DOT to allow the DOT to ascertain whether Subpart E was also based on other enabling legislation. *Id.* at 1280.

In response to the court's remand the DOT published an interim rule in 1981 deleting Subpart E of 49 C.F.R. Part 27 and substituting a new section 27.77 in Subpart D. 46 Fed. Reg. 37488 (1981). This new section 27.77 did not impose any program-specific requirements regarding mass transportation *facilities* but was limited to mass transportation *services*. *Id.* at 37492. This section established a system whereby recipients of federal funds could engage in "special efforts" to satisfy their obligations for promoting transportation services to handicapped individuals.[3] *Id.* The only modification to Subpart C was to delete any reference to Subpart E. *Id.* at 37492.

II.

From 1979 through 1986, officials from the City of Philadelphia and from SEPTA[4] planned and executed a $5.3 mil-

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3. For example, if recipients of federal funds certified that they had established paratransit services for wheelchair users and semi-ambulatory handicapped persons involving the expenditure of an average annual dollar amount equivalent to a minimum of 3.5 percent of the financial assistance received under section 5 of the Urban Mass Transit Act, 49 U.S.C. § 1604, they were deemed to be in compliance with Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, Section 16 of the Urban Mass Transit Act of 1964, 49 U.S.C. § 1612, and Section 165 of the Federal-Aid Highway Act of 1973, 23 U.S.C. § 142 note, with regard to making services accessible. 46 Fed. Reg. 37488, 37492-93 (1981), codified at 49 C.F.R. 27.77 (a)(1), (a)(4), Appendix A.

4. The City of Philadelphia owns the Broad Street Line, including the Columbia Avenue Station. SEPTA leases the city-owned trains and facilities, and is responsible for the possession, operation and maintenance of the Broad Street Line The City planned the project in conjunction with SEPTA.

lion renovation of the Columbia Avenue subway station. The Urban Mass Transportation Administration ("UMTA"), an agency of the DOT, provided $4.3 million in grants for the Columbia Avenue station renovation pursuant to Section 3 of the Urban Mass Transportation Act, 49 U.S.C. 1602. The proposal for the Columbia Avenue station renovation, which included the construction of an elevator shaft to service the northbound platform of the station, was submitted in 1978 and funding initially was approved in 1979.

In 1981, the City of Philadelphia requested UMTA's approval of the City's revised plan to delete the proposed elevator shaft at the Columbia Avenue subway station. Joseph Mayer, Director, Office of Engineering, UMTA, informed the City by letter of December 14, 1981 that:

> Since it is this Administration's view that the method of compliance with Section 504 of the Rehabilitation Act of 1973 is a matter of local preference and since the City has filed its certification of compliance with the "Special Efforts" requirements published in the federal register on July 20, 1981, your decision to make this change can be made without UMTA's approval.

In effect, UMTA stated that it need not approve the proposal as long as the requirements for accessibility of services in Subpart D of Part 27 were satisfied, thereby also meeting the requirements of Subpart C of Part 27, 49 C.F.R. § 27.67 by making the facilities accessible as well. The project was thereupon completed without the addition of the elevator.

The plaintiffs filed this declaratory judgment action claiming principally that the City's failure, as part of the renovation, to make the Columbia Avenue station accessible to mobility-impaired persons violates Section 504 of the Rehabilitation Act, as amended, 29 U.S.C. § 794 and the regulations issued pursuant thereto.[5] The plaintiffs claimed that the

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5. Section 504 affords a private right of action to handicapped persons who are excluded from federally funded programs. *N.A.A.C.P. v. The Medical Center Inc.*, 599 F.2d 1247, 1258-59 (3d Cir. 1979); *see also, Smith v. U.S. Postal Service*, 766 F.2d 205 (6th Cir. 1985); *Carter v. Orleans Parish*

defendants had failed to comply with the requirements of Subpart C regarding accessibility to the handicapped of mass transit facilities renovated with federal funds and in addition had failed to make the required special efforts to provide transportation services. The defendants answered that they had complied with the "special efforts" requirements of 49 C.F.R. § 27.77 and had thereby fully satisfied their obligations under federal law to provide transportation usable by handicapped persons.

The plaintiffs moved to have the case certified as a class action, pursuant to Fed. R. Civ. P. 23(a) and (b) (2) on behalf of mobility-disabled persons who are or will be denied access to and effective use of the mass transit facilities which the City owns and which were altered with the use of federal financial assistance. The defendants moved for summary judgment and the plaintiffs filed a cross-motion for partial summary judgment.

The district court certified the class, granted the defendant's motion for summary judgment, and denied the plaintiffs' motion. The district court determined that there were no issues of fact regarding the City's expenditures for paratransit since 1981. The court further determined that those expenditures satisfied the "special efforts" requirements of the regulations, resulting in the defendants having satisfied the requirements of the statute as a matter of law.

On appeal, the plaintiffs do not challenge the district court's determination regarding the defendants' compliance

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Public Schools, 725 F.2d 261 (5th Cir. 1981); *Doe v. New York University*, 666 F.2d 761 (2nd Cir. 1981); *Helms v. McDaniel*, 657 F.2d 800 (11th Cir. 1981), *rehearing denied* 664 F.2d 291, *cert. denied*, 455 U.S. 946 (1982); *Lloyd v. Regional Transp. Authority*, 548 F.2d 1277 (7th Cir. 1977).

The plaintiffs also claimed that the defendants had violated section 165 of the Federal-Aid Highways Act, 23 U.S.C. § 142, section 16(a) of the Urban Mass Transportation Act, as amended by section 317(c) of the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 1612(a), (d), the regulations applicable to these statutes, and 42 U.S.C. § 1983. We need not reach those contentions in light of our disposition under Section 504 of the Rehabilitation Act.

with the "special efforts" requirements. The plaintiffs instead argue that "special efforts" are no defense to their claim that the defendants failed, during renovations, to make the Columbia Avenue station usable by mobility-disabled persons in accordance with the DOT regulations.

Summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). On review the appellate court is required to apply the same test the district court should have utilized initially. *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976). *cert. denied*, 429 U.S. 1038 (1977). In determining the applicable law, we must first examine the district court's interpretation of the DOT regulations. This is a question of law subject to plenary review. *Gaines v. Amalgamated Ins. Fund*, 753 F.2d 288, 290 (3d Cir. 1985). We have jurisdiction pursuant to 42 U.S.C. § 1291.

III.

The district court relied primarily on its interpretation of the requirement in Subpart C, that "[t]he provisions of this subpart should be interpreted in a manner that will make them consistent with the provisions of subparts D and E. In the case of apparent conflict, the provisions of subparts D and E shall prevail." 49 C.F.R. § 27.61 (1981). The district court interpreted this language to mean that, "for those programs which actually provide mass transportation service to the mobility-impaired, the specific provisions of Subpart D govern, and not the more general requirements of Subpart C." The court apparently also relied upon the letter to the City from UMTA which expressed the opinion that, having filed its certification of compliance with the "special efforts" requirements, the City was not required to include elevators in its plan for the Columbia Avenue renovation. The district court decided that the defendants' decision to omit an elevator,

ramp, lift or other special mechanism for persons in wheelchairs from the planned renovation of the Columbia Avenue subway station, which serves Temple University in Philadelphia, satisfied the requirements of the relevant statutes as interpreted in the DOT regulations.

During the pendency of this appeal, a second suit was filed in the same district court whose order we now review in this case, challenging once again the City's exclusion of an elevator from the Columbia Avenue subway station. *Eastern Paralyzed Veterans Association of Pennsylvania, Inc., et al. v. Dudley R. Sykes, et al.*, No. 86-6797 (E.D. Pa. filed June 4, 1987). The district court requested that the DOT submit its interpretation of 49 C.F.R. Part 27 as applicable to the Columbia Avenue station. The DOT complied and, pursuant to Fed. R. App. P. 29, filed a copy of that interpretation as a memorandum amici curiae in this appeal.

In requesting that we take judicial notice of its interpretation, the DOT points to the central importance to recipients of federal funds of uniformity and predictability in interpretation of these regulations. We agree and thus will review the DOT's proffered interpretation in accordance with the normal standard. An agency's interpretation of its own regulations is owed considerable deference. *Presinzano v. Hoffman-La Roche, Inc.*, 726 F.2d 105 (3d Cir. 1984). In construing administrative regulations, the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation. *U.S. v. Larionoff*, 431 U.S. 864 (1977); *see also Director, Office of Workers' Compensation Programs, United States Dept. of Labor v. Mangifest*, No. 86-3447, Slip op. at 17 (3d Cir. Aug. 21, 1987).

The regulations at issue here were enacted pursuant to Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, upon which plaintiffs base their claim. Section 504 provides that "[n]o otherwise qualified handicapped individual in the United States ... shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program receiving

Federal financial assistance." This section "is both ambiguous and lacking in specifics." *Rhode Island Handicapped Action Committee v. Rhode Island Public Transit Authority,* 718 F. 2d 490, 494 (1st Cir. 1983). Consequently, other courts have suggested that the relevant federal agency and not the court has the chief responsibility to determine what Section 504 requires of recipients of federal funds in accommodating the needs of disabled persons. *Id., citing Southeastern Community College v. Davis,* 442 U.S. 397, 413 (1983).

The DOT interpretation is that Subparts C and D of 49 C.F.R. Part 27 establish separate, independent criteria and, in order to comply with the DOT regulations and Section 504 of the Rehabilitation Act, the requirements set forth in both subparts must be satisfied.

The DOT argues that the 1981 regulations replacing Subpart E with § 27.77 in Subpart D did not require, as had Subpart E, that mass transportation services be made fully accessible. Rather it required that recipients of federal funds certify that "special efforts . . . to provide transportation that handicapped persons, including wheelchair users and semi-ambulatory persons, can use" were being made. 49 C.F.R. 27.77(a)(1) (1981). Subparagraph (a)(4) of 27.77 stated, however, that:

> compliance with such certification shall be deemed to constitute compliance with section 504 of the Rehabilitation Act of 1973, section 16(a) of the Urban Mass Transportation Act of 1964, as amended, and section 165(b) of the Federal-Aid Highway Act of 1973, *insofar as these statutes relate to the provision of mass transportation service* that handicapped persons can use.

49 C.F.R. 27.77(a)(4) (1981) (emphasis added). In the section of the preamble to the 1981 regulations explaining 27.77, the DOT further clarified this point, stating that:

> compliance with the certification under this subsection shall be deemed compliance with section 504, section 16 and section 165. Compliance in this context refers only to

> compliance with the obligation of recipients to ensure the provision of transportation *service* that handicapped persons can use (and planning for such transportation). *The certificate does not stand for compliance with other requirements. . . .*

46 Fed. Reg. 37488, 37490 (1981) (emphasis added).

The DOT's intention is clear—compliance with 49 C.F.R. 27.77, regarding accessibility of transportation services, does not release federal fund recipients from compliance with Subpart C's requirements regarding the accessibility of transportation facilities.

The district court reached a contrary conclusion, based upon its interpretation of the requirement, in Subpart C, that "[t]he provisions of this subpart should be interpreted in a manner that will make them consistent with the provisions of subparts D and E. In the case of apparent conflict, the provisions of subparts D and E shall prevail." 49 C.F.R. 27.61 (1981). However, the DOT interprets this language as referring to conflicts between the subparts requirements with regard to facilities, not services. For example, if, in the context of a question concerning the accessibility of rapid rail transit, a conflict were to arise between Subpart C's more general requirements with regard to accessibility of airport facilities and Subpart E's more specific requirements with regard to accessibility of facilities, Subpart C provided that the provisions in Subpart E would prevail. *Id.* Likewise, if, in the context of a question concerning the accessibility of an airport terminal, a conflict with regard to accessibility of facilities and Subpart D's more specific requirements with regard to accessibility of facilities, Subpart C provided that the provisions in Subpart D would prevail. *Id.* In short, for a conflict between the Subparts to arise, the dispute must involve a question regarding accessibility of facilities, not services.[6]

In response to the ruling of the Court of Appeals for the

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6. It was not possible to have a conflict between Subpart C and Subparts D and E regarding accessibility of services since Subpart C did not address accessibility of services. *See* 49 C.F.R. § § 27.61 through 27.67.

D.C. Circuit in *APTA, supra,* the DOT deleted Subpart E, replacing it with a new paragraph 27.77 in Subpart D. 46 Fed. Reg. 37488, 37489 (1981). Paragraph 27.77 simply established program-specific requirements for accessibility of services for the handicapped. *Id.* at 37492. This action effectively eliminated any specific program requirements regarding accessibility of facilities for mass transportation modes, such as rapid rail services, which originally were addressed in Subpart E. Under the 1981 regulations, the only "conflict," as that term is used in Subpart C, which could then arise, which would require resolution by deference to Subpart D, involves disputes concerning the accessibility of facilities in airports, railroads and highways, *i.e.,* those specific transportation modes covered by Subpart D.[7]

We find nothing clearly erroneous or inconsistent in the DOT's interpretation that Subparts C and D of the regulation, 49 C.F.R. Part 27, established separate, independent criteria for compliance with the regulation, and both sets of requirements must be satisfied. Consequently the DOT's interpretation is controlling.

IV.

We turn now to Subpart C of the DOT regulations which govern this dispute. Subpart C requires that:

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7. An anomalous situation was created by revocation of Subpart E without substantive modification of Subpart C. Subpart C requires that facilities which provide access to mass transportation services be made accessible under certain circumstances without a concomitant requirement that the services themselves be made accessible. However, the Architectural Barriers Act of 1968, as amended, 42 U.S.C. 4151 *et seq.,* ("the Barriers Act") and the regulations promulgated thereunder by the General Services Administration ("GSA"), 41 C.F.R. Subpart 101-19.6, prescribe accessibility standards for the design, construction and alteration of "buildings." See 4 Fed. Reg. 31442, 314590 (1979). New fixed facilities and alterations to existing fixed facilities which are funded by a grant or loan from the DOT must comply with the GSA regulation. *Id.* The DOT intended that 49 C.F.R. 27.67 reflect the basic requirement of GSA's regulation. 44 Fed. Reg. 31442, 31450 (1979). Therefore, the DOT retained Subpart C's requirement that those portions of mass transportation facilities that are undergoing renovation must be made accessible to the maximum extent feasible. *See* 49 C.F.R. 27.67(b).

> Each [new] facility or part of a facility constructed by, on behalf of, or for the use of a recipient [of federal funds] shall be designed, constructed, and operated in a manner so that the facility or part of the facility is accessible to and usable by handicapped persons. . . .

49 C.F.R. § 27.67(a) (1981).

> Each facility or part of a facility which is altered by, on behalf of, or for use of a recipient . . . in a manner that affects or could affect the accessibility of the facility or part of the facility shall, to the maximum extent feasible, be altered in such a manner that the altered portion of the facility is readily accessible to and usable by handicapped persons.

49 C.F.R. 27.67(b) (1981).

Subparagraph 27.67(d) of the DOT's regulation states that:

> Design, construction or alteration of fixed facilities in paragraphs (a) and (b) of this section shall be in accordance with the minimum standards in the "American National Standard Specifications for Making Buildings and Facilities Accessible to, and Usable by the Physically Handicapped," published by ANSI, Inc. (ANSI A117.1-1961 (R1971)), which is incorporated by reference in this part.

29 C.F.R. 27.67(d) (1981).[8]

V.

The governing substantive law identifies which facts are material for purposes of summary judgment. We must now determine whether, in light of the DOT's interpretation of its regulations, the undisputed facts show that either the defendants or the plaintiffs were entitled to judgment as a matter of law. We look to the plaintiffs' burden at trial, which will be to prove that:

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8. This regulation refers to the 1971 ANSI standard and was never amended to incorporate the ANSI standard as revised in 1981.

(1) the City, with federal funding, constructed a new facility or part of a facility, or altered a facility in a manner that affects or could affect its accessibility; and

(2) the new construction "is accessible to and usable by handicapped persons" or the alterations are "to the maximum extent feasible . . . readily accessible to and usable by handicapped persons" as insured by the ANSI [American National Standards Institute] standards for accessibility.

In the defendant's motion for summary judgment, the defendants chose to stand on the legal principles which they advocated to be applicable. They relied upon the asserted absence of factual issues concerning their compliance with the "special efforts" provisions. They made no representations as to the state of the evidence with regard to their compliance with Subsection C dealing with facilities.

We have determined that compliance with the "special efforts" requirements does not constitute a defense to noncompliance with Subpart C. Therefore summary judgment for the defendants was entered in error, and we will vacate the order of the district court.

The plaintiffs' cross-moved for summary judgment asserting that there were no issues of material fact and that the plaintiffs were entitled to judgment as a matter of law, declaring that the City has a duty under Subpart C to make the Columbia Avenue station accessible to handicapped individuals despite its compliance with the "special efforts" requirements. We turn now to determine whether there are disputed issues of fact bearing on the City's fulfillment of any obligations under Subpart C in its renovation of the Columbia Avenue station.

We have carefully reviewed the plaintiffs' submissions in support of their motion for summary judgment. Several photographs depicting the renovated areas, which were submitted with plaintiffs' cross-motion, have enhanced our understanding of the nature and extent of the station rehabilitation

project. The defendants have adduced nothing to controvert the plaintiffs' evidence.

It is undisputed that, with the assistance of federal funding, the City either partially or entirely reconstructed one stairway leading from the street to the northbound terminal and two stairways leading from the street to the southbound terminal at the Columbia Avenue station, and that no means of access was provided at these locations for persons in wheelchairs. On the northeast side of the station, an entirely new headhouse was constructed, two new stairways were built, and an escalator was installed, all providing access to the northbound terminal, again with no provision for persons in wheelchairs.

The plaintiffs argue that the altered portions are "entrances" to the station. The ANSI standard does not define the term "entrance". However, Section 5.2 of the 1971 ANSI standard provides:

> 5.2.1 At least one primary entrance to each building shall be usable by individuals in wheelchairs.
>
> 5.2.2 At least one entrance usable by individuals in wheelchairs shall be on a level that would make the elevators accessible.

The plaintiffs argue that these are the relevant standards and that the defendants are not in compliance with them.

The defendants and the amicus curiae argue that the altered portion or item of the station is a staircase, and that consequently the only relevant ANSI standards are those applicable to stairs. In the preamble to the final rule implementing the 1979 regulation, the DOT explained:

> It should be noted that [49 C.F.R. 27.67(b)] applies only to the altered portion or item of a fixed facility. Thus, a stair renovation to meet the ANSI standard [American National Standards Institute] does not impose a requirement for elevator installation since the elevator is not within the scope of the stair alteration project.

49 C.F.R. Part 27 (1979).

The DOT argues in its amicus brief that nothing in the

ANSI standard suggests that, in the context of a subway station, the stairs or escalators inside a facility leading to the street level be considered an "entrance" for the purpose of determining the relevant standard. We think it is beyond cavil that the areas in question are entrances to the station. However, we think these arguments miss the mark. It is unimportant to define whether the altered portion of a facility is itself an "entrance," "a stairway," or both. Instead the relevant question is to what extent any alterations to a facility provide an opportunity to make the facility more accessible to handicapped persons.[9] The central question is what degree of accessibility, as defined by ANSI standards, becomes "feasible" within the scope of alterations.

It is beyond dispute that the substantial reconstruction of the northeast entrance to the northbound terminal of the Columbia Avenue station "altered" the station "in a manner that affects or could affect the accessibility of the facility." 49 C.F.R. § 27.67(b). The cumulative effect of the applicable regulations is to require that the alteration be effected "to the maximum extent feasible," *id.*, "in accordance with the minimum standards in the 'American National Standard Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped,' published by ANSI, Inc. . . .'" 49 C.F.R. § 27.67(d).

Based on the record before us, there can be no question that it was "feasible" to effect the alterations to the northeast entrance in such a manner as to satisfy the ANSI standard requiring that " . . . at least one primary entrance to each building shall be usable by individuals in wheelchairs." ANSI

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9. In the preamble to the final rule, the DOT explained:

> [49 C.F.R. § 27.67(b)] is based on the belief that alterations present opportunities to design and construct the altered portion or item in an accessible fashion. . . . The basic requirement in [49 C.F.R. § 27.67)] is simply to take the opportunities afforded by the alteration and, to the maximum extent feasible, use the alteration to make the facility accessible. Thus, normal maintenance may take place in practically all cases without generating an accessibility requirement. 44 Fed. Reg. 31442, 31449.

A 117.1-1961 (R-1971), at § 5.2.1.[10] We note that the City's original proposal, which was submitted to UMTA in order to obtain prior approval of federal funding for the renovation, included a plan for construction of an elevator shaft to service the northbound platform. Therefore we find that the plaintiffs are entitled to partial summary judgment establishing the defendant's obligation to make the northeast entrance to the northbound terminal of the Columbia Avenue station usable by persons in wheelchairs.

It is not entirely clear from the evidence of record whether the renovation of the other entrances which were serviced only by stairs amounted to normal maintenance of existing stairs or constituted an "alteration" of the Columbia Avenue station substantial enough, as the plaintiffs claim, to afford an opportunity to make one entrance to the southbound terminal usable by persons in wheelchairs. Consequently we will remand for determination at trial of the maximum extent to which it was feasible, if at all, to incorporate ANSI accessibility standards in accordance with 49 C.F.R. § 27.67(b).

VI.

In accordance with the foregoing we will vacate the order granting summary judgment in favor of the defendants and reverse the order denying partial summary judgment for the plaintiffs. We will remand this case to the district court for entry of an order granting partial summary judgment in favor of the plaintiffs and for further proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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10. We think subsection 5.2.2 providing for access to elevators refers to existing elevators and is thus not applicable here.

Appendix B—Order, Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1021

DISABLED IN ACTION OF PENNSYLVANIA, et al.,
Appellants

vs.

SYKES, Dudley R., Comm. of Phila. Dept. of Public Property, et al.

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified-judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until February 21, 1988. No extensions will be granted.

Carol Los Mansmann
Circuit Judge

Appendix C—Opinion, District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DISABLED IN ACTION et al.	:	CIVIL ACTION
v.	:	
DUDLEY R. SYKES et al.	:	NO. 86-2316

MEMORANDUM

Newcomer, J. December 30, 1986

This action arises out of the recent renovation of the Columbia Avenue station of the Broad Street Subway in Philadelphia, as well as various other mass transit station renovations planned to occur in the future. The Columbia Avenue station is adjacent to Temple University and services the University as well as the rest of the neighborhood. All of the mass transit stations at issue in this case are owned by the City of Philadelphia. The City's now completed renovations of the Columbia Avenue station were extensive, costing $5.3 million, of which $4.3 million was received from the federal government. During the early stages of the planning for the renovations, elevators as well as stairs were included in the plans. The inclusion of elevators would have allowed people who use wheelchairs, and other mobility-impaired individuals, to have access to the train platforms and to use the subway. However, the elevators were deleted from the final plans and the construction of the renovated station.

Plaintiffs are Disabled in Action of Pennsylvania ("DIA"), a non-profit corporation the members of which seek to guarantee equal access of disabled people to mass transit in general and in particular to the Broad Street subway, and nine individuals who are mobility impaired in one manner or another. Many of the individual plaintiffs and members of DIA are required to use wheelchairs to get around the City and to perform their responsibilities at work and school. In addition, the plaintiffs seek to have this case certified as a class action

on behalf of all mobility disabled people who are denied access to and effective use of federally funded mass transportation because of physical and structural barriers in the design of transit equipment and facilities, and who would be able to use mass transportation if the functional capabilities of disabled people were accommodated by the defendants. The defendants are Dudley R. Sykes, Commissioner of the Philadelphia Department of Public Property, and the City of Philadelphia. The City receives federal mass transit assistance, and funded the renovations of the Columbia Avenue station and other stations with that federal assistance.

In general, plaintiffs seek declaratory and injunctive relief prohibiting defendants from altering stations of the Broad Street Subway and the Market-Frankford Elevated systems without rendering the renovated stations accessible to mobility impaired people. Plaintiffs also seek an injunction specifically requiring defendants to render the Columbia Avenue station accessible to the mobility impaired through the installation of elevators from the street level to the northbound and southbound train platforms.[1] Plaintiffs base their claim for relief on three statutes pertaining to mass transit, the regulations issued pursuant thereto, and on 42 U.S.C. § 1983.[2] In particular, plaintiffs claim that defendants violated section 504 of the Rehabilitation Act of 1973, as amended, 49 U.S.C. § 794, section 165 of the Federal-Aid Highways Act ("FAH Act"), 23 U.S.C. § 142, and section 16(a) of the Urban Mass Transportation Act ("UMT Act"), as amended by section 317(c) of the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 1612(a), (d), and the regulations which apply to these statutes.

Defendants have taken the position that they are not required by the relevant statutes and regulations to make the

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1. Plaintiffs moved for a preliminary injunction regarding the Columbia Avenue station, but agreed to consolidate the matter with the cross-motions for summary judgment which are among the subjects of this Memorandum and Order.

2. The alleged section 1983 violation is precisely the failure to comply with the other named statutes and their regulations.

stations they renovate with federal funds accessible to the mobility impaired. Rather, defendants contend that compliance with the "special efforts" requirements on behalf of the handicapped satisfy the obligations of the mass transit system under the federal laws upon which plaintiffs base their claims. The plaintiffs, on the other hand, take the position that, while "special efforts" on behalf of the handicapped are required, in addition every station or other facility renovated with the use of federal funds must be made accessible to the handicapped.

Because defendants believe that there are no material issues of fact and that they are entitled to judgment as a matter of law, they have moved for summary judgment. Plaintiffs cross-moved for partial summary judgment on the issue of whether the City has a legal duty to make any new or renovated subway or elevated station accessible to handicapped individuals. For the reasons enumerated below, defendants' motion for summary judgment will be granted.

I. Facts

The City of Philadelphia owns the Broad Street Subway line in its entirety, including the Columbia Avenue station, the other stations, all of the track and the subway trains. In addition, the City owns the Market-Frankford Elevated system ("the Elevated"), the Elevated stations from Bridge Street to Arch Street, and half of the Elevated trains. The remaining Elevated stations and trains are owned by the Southeastern Pennsylvania Transportation Authority ("SEPTA"). SEPTA leases the City-owned trains and facilities, and is responsible for the possession, operation and maintenance of the Broad Street Line and the Elevated within the City.[3]

From 1979 through 1986, the City and SEPTA planned and accomplished the renovation of the Columbia Avenue subway station. This was one of twenty-eight station renova-

3. SEPTA also operates the public bus system within the Philadelphia metropolitan area, as well as the commuter rail system.

tions which have been done in the past fifteen years.[4] The Columbia Avenue renovation cost approximately $5.3 million, of which $4.3 million was provided by the Urban Mass Transportation Administration ("UMTA"), as authorized under section 3 of the UMT Act. As in other cases when the City receives such a grant, the City planned the project in conjunction with SEPTA, and took into consideration SEPTA's concerns about the operation and maintenance of the particular station, and of the system as a whole.

One such concern which applies to all mass transit projects undertaken by the City and SEPTA with the use of federal funding is the provision of public transportation to the handicapped. SEPTA has determined to satisfy the requirements of federal law and regulations regarding the provision of mass transportation to the mobility impaired through paratransit, rather than by making the subway and Elevated systems, and other fixed-route transportation services accessible.[5] This was done in order to provide cost-effective transportation to people who are elderly or who use wheelchairs or who are otherwise mobility disabled, as well as to insure the safety of all mass transit passengers and to avoid unnecessary disruption in service to the general riding public. Affidavit of Carol H. Lavoritano at ¶¶ 3-7.

The paratransit system, introduced in 1981, provides the elderly, the mobility impaired and others with transportation between any two points in the City and to some suburban locations, through the use of special vehicles which are accessible to the handicapped for which the handicapped can reserve rides. Paratransit provides an average of over 900 one way passenger trips per day at a charge of $1.25 per trip. The average cost to SEPTA for each one way paratransit trip is

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4. Since 1971, the City has received $510,200,000 in federal funds for capital transportation expenditures, of which $434,122,000 have been used to construct and renovate mass transportation facilities and other projects.

5. The City and SEPTA have made none of the Subway or Elevated stations they have renovated accessible to the mobility impaired. Certain Elevated stations do have some elevator service because of elevators in adjacent facilities.

approximately $17.40. Affidavit of Robert H. Corressel at ¶¶ 10, 14-15. Except in emergencies, paratransit is provided on a first come, first served basis. Corressel Aff. at ¶ 16. The paratransit system does require that trips be scheduled two or more days in advance. Corressel Aff. at ¶ 14. In addition, the paratransit system operates on a more restricted schedule than the rest of the SEPTA system.

Through paratransit and other "special efforts" to provide public transportation to the handicapped and the elderly, SEPTA and the City have sought to satisfy the requirements imposed by federal law. During the fiscal years from 1981-82 through 1986-87, they have spent from $1.5 million to $4.3 million on such special efforts, totals which amount to between 4.0% and 11.4% of the section 5 operating funds received from UMTA in 1983.[6] *See* Corressel Aff. at ¶ 3. *See also Eastern Paralyzed Vetrans Association of Pennsylvania v. Southeastern Pennsylvania Transportation Authority,* C.A. 85-4460 slip op. (E.D.Pa. Sept. 30, 1986).

In 1979, the City applied to UMTA for a capital grant in order to make improvements to the Columbia Avenue station. As part of the application process, the City gave assurances to UMTA that it would comply with UMTA regulations, including those regarding the elderly and the handicapped. The original plan for the Columbia Avenue renovation included provision for two elevators, one to service northbound trains and one to service the southbound. After repeal of the 1979 UMTA regulations pursuant to section 504 of the Rehabilitation Act and their replacement with the 1981 regulations,[7] the

6. The amount of operating funds received from UMTA in 1983 is the standard against which "special efforts" are measured.

7. Part of the complexity of this case arises from the fact that the applicable regulations were changed during the period in which the City first applied for the grant and finally completed the alterations. The 1979 regulations, which were in place when the City first applied for the funds, pursued the goal of "mainstreaming" the mobility impaired in the use of all forms of public transportation. This approach was abandoned after an adverse court ruling. This history, as well as a discussion of the 1981 regulations which replaced the 1979 "mainstreaming" regulations, appear at part III of this Memorandum.

City notified UMTA of its intention to delete the elevators from the project, and to meet its obligations to provide transportation to the handicapped through "special efforts," including paratransit. Letter from Edwin R. Videki, Chief Transit Engineer of the Philadelphia Department of Public Property, to Mr. Joseph Mayer, Director of the Office of Engineering for UMTA, dated November 9, 1981. In the letter of November 9, 1981, the City sought to obtain UMTA's approval of the change. Mr. Mayer responded to Mr. Videki's request for approval as follows:

> Since it is this Administration's view that the method of compliance with Section 504 of the Rehabilitation Act of 1973 is a matter of local preference and since the City has filed its certification of compliance with the "Special Efforts" requirements published in the federal register on July 20, 1981, *your decision to make this change can be made without UMTA's approval.* We concur in your plans to make provisions on the courtyard design for installation of an elevator at a later date if desired.

Letter from Joseph T. Mayer to Mr. Edwin R. Videki, dated December 14, 1981 (emphasis added). The UMTA funds were then provided and the City actually deleted the elevators from the plans for and the construction of the Columbia Avenue station. However, the Columbia Avenue station does have a space and fittings for elevators if the City is required to install them. The elevators would cost the City between $100,000 and $150,000 each, with annual maintenance costs of approximately $12,000 each.

The omission of the elevators from the Columbia Avenue station and others has caused substantial inconvenience to plaintiffs. At stations where there are no elevators, disabled people and their wheelchairs have been carried up and down the stairs to reach the trains and the street. This particular instance has caused hardship to students and other affiliated with Temple University, many of whom are restricted to the use of Paratransit during the hours which it operates, or more expensive taxicabs.

II. Class Certification

Plaintiffs have moved to have this case certified as a class action pursuant to Fed.R.Civ.P. 23(a) and (b) (2), on behalf of a class composed of mobility disabled persons who are or will be denied access to and effective use of the mass transit facilities that the City owns and that were altered with the use of federal financial assistance. Defendants have not opposed this motion. Because the motion is well founded, I will grant class certification.

In order for a class action to be certified, the plaintiff must establish that all of the requirements of Rule 23(a) are met, as well as one of the requirements of Rule 23(b). Plaintiffs seek certification pursuant to Rule 23(b) (2). Rule 23 provides in relevant part as follows:

> (a) *Prerequisites to a Class Action.* One or more members of a class may sue as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately represent the interests of the class.
>
> (b) *Class Actions Maintainable.* An action may be maintained as a class action of the prerequisites of subdivision (a) are satisfied, and in addition:
>
> * * *
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Unlike class actions brought under subpart (b) (3), notice to the class is not required in actions maintained under subpart (b) (2). *See* Newberg, 2 Class Actions §§ 8.05 at 98, 8.15 at 123-24 (2d ed. 1985).

A. Rule 23(a)

1. Numerosity.

To determine whether the numerosity requirement is met, the court must determine if the number of people in the class is so large that joinder of all members is not practicable. *Hansberry v. Lee,* 311 U.S. 32, 41 (1940). Arbitrary rules which set precise numerical requirements have been rejected. This Court has certified classes composed of fourteen members. *Manning v. Princeton Consumer Discount Co.,* 390 F.Supp. 320, 324 (E.D.Pa. 1975), *aff'd,* 533 F.2d 102 (3d Cir. 1976). It has also certified a class where the exact number and identity of the class members were unknown, but the existence of the class was clear. *See e.g., Santiago v. City of Philadelphia,* 72 F.R.D. 619, 624 (E.D.Pa. 1976) (class consisting of all individuals confined at the Philadelphia Youth Study Center).

While plaintiffs do not know the exact number of individuals composing the class, plaintiffs know that there are approximately 110 mobility disabled students enrolled at Temple University, and that there are more than 30,000 mobility impaired persons in Philadelphia according to the 1980 Census. Furthermore, the nature of the class indicates that it is a significant and cohesively defined group. The numbers are certainly substantial enough to meet the numerosity requirement.

2. Commonality.

It is clear from the nature of this lawsuit that there are common questions of law and fact. Among the common questions are whether plaintiffs' rights under the Rehabilitation Act have been violated, whether the defendants violated the applicable regulations and whether the facilities in question are inaccessible to the mobility impaired.

3. Typicality.

The typicality requirement is met when there is no antagonism between the claims and interests of the representa-

tives and those of the class. *In re Penn Securities Litigation*, 62 F.R.D. 181, 189 (E.D.Pa. 1974); Wright & Miller, *Federal Practice and Procedure* § 1764. The named plaintiffs are typical of the class members as a whole. All are mobility impaired or claim that they have been otherwise injured because of the inaccessibility of the subway and the Elevated to the mobility impaired.

4. Adequacy of Representation.

Adequacy of representation depends both on the representative plaintiffs' lack of antagonistic interest to that of the class, and on the ability of counsel to represent and protect the interests of the class. *Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239, 247 (3d.Cir), *cert, denied,* 421 U.S. 1011 (1975). I have no reason to conclude that the interests of the class representatives are in any way antagonistic to those of the class. And the representation of class counsel has been both vigorous and up to the highest professional standards.

B. Rule 23(b) (2).

Rule 23(b) (2) permits pursuit of a class action when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." The "generally applicable" requirement is satisfied when the party opposing the class has acted in a consistent manner with respect to the members of the class. *See Griffin v. Burns*, 570 F.2d 1065, 1074 (1st Cir. 1978). As the Advisory Committee noted in its explanation of Rule 23(b) (2), "[a]ction . . . is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class."

In the instant case, plaintiffs seek both injunctive and declaratory relief based on action which has uniform applicability on all members of the class: the manner in which defendants have sought to comply with federal regulations

regarding the provision of transportation to the mobility impaired, and the fact that defendants have failed to render accessible facilities which have been renovated with federal financial assistance.

Because all of the requirements of Rule 23(a) and (b)(2) have been met, I will certify the class.

III. Legal Analysis.

Plaintiff's main claim in this action is that the defendants' failure to make subway and Elevated stations renovated with UMTA funds accessible to the mobility impaired violates the section 504 of the Rehabilitation Act, as amended. That section provides in relevant part:

> No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity conducted by any Executive agency.

29 U.S.C. § 794.[8] "An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979).

Federal mass transportation funding is usually provided through the UMT Act. Under that act, it is declared to be national policy

> that elderly and handicapped persons have the same

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8. Plaintiffs' have a private right of action in this case under the Rehabilitation Act. *N.A.A.C.P. v. The Medical Center, Inc.*, 599 F.2d 1247, 1258-59 (3d Cir. 1979). The regulations promulgated under that Act as relate to mass transportation and upon which this case depends also cite as their authority the UMT Act and the FAH Act. *See* 49 C.F.R. Part 27. I am therefore not required to determine if the UMT Act and the FAH Act provide for private causes of action in their own rights. Furthermore, for the reasons stated by Judge Weinfeld in *Dopico v. Goldschmidt*, 518 F.Supp. 1161, 1176-79 (S.D.N.Y. 1981), *aff'd in part, rev'd in part on other grounds*, 687 F.2d 644 (2d Cir. 1982), I conclude that plaintiffs may not recover for alleged violations of the UMT Act and the FAH Act through section 1983.

> right as other persons to utilize mass transportation facilities and services; that special efforts shall be made in the planning and design of mass transportation facilities and services so that the availability to elderly and handicapped persons of mass transportation which they can effectively utilize will be assured.

49 U.S.C. § 1612(a). In addition, the FAH Act, as amended, makes similar provision for the policy of requiring special efforts to provide mass transportation to elderly and handicapped people. 23 U.S.C. § 142 note (1976).

In 1976, UMTA adopted regulations to implement these three statutes. 49 C.F.R. Parts 609, 613 (1976). The regulations required a planning process by local authorities to carry out the mandated policies, but required that the "special efforts" achieve certain levels of service which the elderly and the handicapped could effectively use. 23 C.F.R. § 120(a)(5). *See Disabled in Action of Baltimore v. Bridwell*, 593 F.Supp. 1241, 1246 (D.Md. 1984). In 1979, a second set of regulations were promulgated after the Department of Health, Education and Welfare established guidelines for all agencies in implementing section 504 of the Rehabilitation Act. "These guidelines required that 'all recipients of federal funds 'mainstream' handicapped persons, that is integrate such persons into the same programs available to others, rather than treat them as a special group in separate programs.'" *Id.*, quoting *American Public Transit Ass'n (APTA) v. Lewis*, 655 F.2d 1272, 1275 (D.C. Cir. 1981).

Mainstreaming in public transportation required that each mode of transportation be made accessible to the handicapped. *See* 45 C.F.R. § § 85.56-85.57. Because the 1976 regulations were inconsistent with the mainstreaming requirement, new regulations were promulgated. These new 1979 regulations, codified at 49 C.F.R. § § 27.82-27.107 (1980), implemented the mainstreaming requirement, mandating that all forms of mass transit be rendered accessible to handicapped people. However, in 1981, the District of Columbia Court of Appeals invalidated the 1979 regulations, *APTA*, *su-*

pra,[9] concluding that the mainstreaming requirement exceeded the Department of Transportation's authority to enforce section 504 of the Rehabilitation Act. As a result of the *APTA* decision, the Department of Transportation issued new regulations in 1981, supercedeing the 1979 regulations. These 1981 regulations, which are currently in effect, return to the "special efforts" model of the 1976 regulations for providing mass transit to the elderly and the handicapped. *Dopico*, *supra*, 687 F.2d at 648; *Bridwell*, *supra*, 593 F.Supp at 1246-47.

The current regulations were promulgated "to carry out the intent of section 504 of the Rehabilitation Act," 49 C.F.R. § 27.1: to prevent discrimination against the handicapped and to prevent the handicapped being excluded from participation in programs receiving federal money. *Id. See also* 49 C.F.R. § 27.7. Subpart C of the 1981 regulations provides *in general* for the accessibility of the handicapped to all Department of Transportation programs. 49 C.F.R. § 27.61. Section 27.61 also states as follows:

> Additional provisions with respect to certain specific programs of the Department are set forth in Subpart D. The provisions of this subpart should be interpreted in a manner that will make them consistent with the provisions of Subpart D. In the case of apparent conflict, the provisions of Subpart D will prevail.

Pursuant to the general directive of Part 27, 49 C.F.R. § 27.67 sets forth accessibility requirements applicable to Department of Transportation projects generally:

> (b) *Alteration*. Each facility or part of a facility which is altered by, on behalf of, or for the use of a recipient . . . in any manner that affects or could affect the accessibility

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9. Plaintiffs correctly point out that the *APTA* decision only invalidated subpart E of the 1979 regulations. The 1981 regulations, which superceded the 1979 regulations, deleted subpart E and the references thereto in the other subparts of 49 C.F.R. Part 27 (1980). The 1981 regulations did not delete or supercede subparts C or D, or change the way in which those two subparts relate to each other.

> of the facility or part of the facility shall, to the maximum extent feasible, be altered in such a manner that the altered portion of the facility is readily accessible to and useable by handicapped persons.

Plaintiffs argue that the defendants have violated the regulations and hence the statute by failing to make the Columbia Avenue subway station, and possibly other stations, accessible according to this regulation.

Subpart D of this Department of Transportation regulation, however, sets program accessibility requirements for specific programs, including mass transportation programs under the UMT Act and the FAH Act. In particular, 49 C.F.R. § 27.77 sets out the specific requirements in these areas:

> (a) *Certification*. (1) Recipients of funds under sections 3 and 5 of the [UMT Act] shall certify that special efforts are being made in their service area to provide transportation that handicapped persons, including wheelchair users and semiambulatory persons, can use. These special efforts shall be consistent with the guidance in Appendix A to this subpart.
>
> * * *
>
> (4) The UMTA or FHWA Administrator shall accept such certification, and compliance with such certification shall be deemed to constitute compliance with section 504 of the Rehabilitation Act of 1973, section 16(a) of the [UMT Act as amended], and section 165(b) of the [FAH Act], insofar as these statutes relate to the provision of mass transportation service that handicapped persons can use.

It is therefore clear from the regulations themselves that for those programs which actually provide mass transportation service to the mobility impaired, the specific provisions of Subpart D govern, and not the more general requirements of Subpart C.

Although the means of compliance with the special efforts requirements are left to local determination, *see* Subpart D, Appendix A, Appendix A does provide three examples

of "the level of effort which will be deemed to satisfy this requirement." The first example is "[a] program for wheelchair users and semiambulatory handicapped persons that will involve the expenditure of an average annual dollar amount equivalent to a minimum of 3.5 percent of the financial assistance in that urbanized area received in FY 83 under section 5 of the UMT Act." There is no dispute that expenditures for paratransit qualify as special efforts as that term is used in 49 C.F.R. Part 27.

It is apparent that the defendants have indeed exceeded the 3.5% benchmark every year since the 1981 regulations took effect, and in recent years by a substantial margin. In addition, it is not disputed that defendants have so certified. As a result, according to the regulations, the defendants are deemed by the law to have satisfied all of the statutes which plaintiffs claim were violated.

Plaintiffs point out that Appendix A requires special efforts consist of actions which "go beyond" the accessibility requirements. They therefore argue that special efforts requirements must be in addition to the general requirements of accessibility contained in Subpart C. I believe that plaintiffs misconstrue the regulations. According to the provision of section 27.61, any conflict between Subparts C and D is to be resolved in favor of the more specific requirements of Subpart D. And that subpart specifically provides that satisfactory special efforts constitute the total obligation under the statutes regarding programs which actually involve the provision of transportation to the mobility impaired. I therefore conclude that the defendants have satisfied the requirements of the statutes which plaintiffs claim they violated, and that the defendants are entitled to judgment as a matter of law.

An appropriate Order follows.

/s/

Clarence C. Newcomer, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DISABLED IN ACTION et al.	:	CIVIL ACTION
v.	:	
DUDLEY R. SYKES et al.	:	NO. 86-2316

ORDER

AND NOW, this 30th day of December, 1986, it is hereby Ordered as follows:

1. Plaintiff's motion for class certification is GRANTED. The class is defined as follows: Mobility disabled persons who are or will be denied access to and effective use of the mass transit facilities owned by the City of Philadelphia which were or will be altered with the use of federal financial assistance.

2. Defendants' motion for summary judgment is GRANTED. Judgment is entered in favor of the defendants and against the plaintiffs.

3. Plaintiffs' motion for partial summary judgment is DENIED.

4. Plaintiffs' motion for a preliminary injunction is DENIED.

AND IT IS SO ORDERED.

/s/

Clarence C. Newcomer, J.

Appendix D—Statutes and Regulations Involved

SECTION 504 OF THE REHABILITATION ACT OF 1973, 29 USC § 794 STATES:

§ 794. Nondiscrimination under Federal grants and programs; promulgation of rules and regulations

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) [29 USC § 706(7)], shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

49 CFR § 27.67 STATES:

§ 27.67 New facilities and alterations.

(a) *Design and construction.* Each facility or part of a facility constructed by, on behalf of, or for the use of a recipient shall be designed, constructed, and operated in a manner so that the facility or part of the facility is accessible to and usable by handicapped persons, if the construction was commenced after the effective date of this part; with respect to vehicles, unless otherwise provided in Subpart D, this requirement is effective for vehicles for which solicitations are issued or which are leased after the effective date of this part.

(b) *Alteration.* Each facility or part of a facility which is altered by, on behalf of, or for the use of a recipient after the

effective date of this part in a manner that affects or could affect the accessibility of the facility or part of the facility shall, to the maximum extent feasible, be altered in such a manner that the altered portion of the facility is readily accessible to and usable by handicapped persons.

(c) When an existing vehicle is renovated substantially to prolong its life, the vehicle shall, to the maximum extent feasible, meet the requirements for a comparable new vehicle. Lesser renovations shall incorporate accessibility features for a comparable new vehicle when practicable and justified by the remaining life expectancy of the vehicle.

(d) *ANSI standards.* Design, construction or alteration of fixed facilities in paragraphs (a) and (b) of this section shall be in accordance with the minimum standards in the "American National Standard Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped," published by ANSI, Inc. (ANSI A117.1-1961 (R1971)), which is incorporated by reference in this part. Departures from particular requirements of these standards by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided.

49 CFR § 27.77 STATES:

§ 27.77 Urban Mass Transportation Administration—Mass Transit.

(a) *Certification.* (1) Recipients of funds under sections 3 and 5 of the Urban Mass Transportation Act shall certify that special efforts are being made in their service area to provide transportation that handicapped persons, including wheelchair users and semiambulatory persons, can use. These special efforts shall be consistent with the guidance in Appendix A to this subpart. Appendix B to this subpart provides advisory information on planning transportation that handicapped persons can use.

(2) Recipients of funds under section 18 of the Urban Mass Transportation Act shall certify that special efforts are

being made in their service area to provide transportation that handicapped persons, including wheelchair users and semi-ambulatory persons, can use. This transportation shall be reasonable in comparison to the transportation provided to the general public and shall meet a significant fraction of the actual transportation needs of such persons within a reasonable time.

(3) The initial certification by each current recipient or grant applicant under this section shall be made within 60 days of the effective date of this section, and sent to the UMTA Regional Administrator, or, for section 18 applicants and recipients, to the FHWA Division Administrator through the designated section 18 state agency. Grant applications submitted after the effective date of this section shall include a certification or incorporate a prior certification by reference. Certifications may provide that the special efforts will be made within six months of the effective date of this section.

(4) The UMTA or FHWA Administrator shall accept such certification, and compliance with such certification shall be deemed to constitute compliance with section 504 of the Rehabilitation Act of 1973, section 16(a) of the Urban Mass Transportation Act of 1964, as amended, and section 165(b) of the Federal-Aid Highway Act of 1973, insofar as these statutes relate to the provision of mass transportation service that handicapped persons can use.

(b) *Noncompliance*. A failure to certify as required by this section or a pattern of failure to carry out special efforts as required by this section constitutes noncompliance with this part. Following administrative enforcement procedures set forth in Subpart F of this part, recipients that have failed to certify as provided in paragraph (a) of this section or that are found to have exhibited a pattern of failure to carry out such efforts are subject to having their certification revoked and to other administrative sanctions as provided in Subpart F.

(c) *Disparate Treatment*. Notwithstanding the recipient's certification under paragraph (a) of this section, the recipient shall not on the ground of handicap deny transportation service on the recipient's system of mass transportation for the

general public to any handicapped person capable of using such service, or otherwise discriminate against such person in connection with such service.

The Dept. of Transportation's Section-by-Section analysis of 49 C.F.R. § 27.67(a), (b) at 44 Fed. Reg. 31449 (1979) provides:

§ 27.67 *New Facilities and Alterations*. This section establishes general requirements for accessibility to facilities which are constructed or altered after the regulations go into effect, and applies the ANSI standards to this construction or alteration.

The Department has changed this section from the NPRM in a number of respects. As a clarification, paragraph (a) now states that facilities must be designed, constructed and "operated" in a manner so that they are accessible. This paragraph now also specifies that the accessibility requirement applies to vehicles ordered or leased after the effective date of the regulation, unless otherwise provided in Subpart D or E.

Some clarifications in paragraph (a) suggested by commenters—for example, that all components of a transportation program, train cars as well as station platform, be made accessible—are not needed because other portions of the regulation state the requirement. Objections to the proviso in paragraph (b) that alterations of facilities should be made accessible "to the maximum extent feasible" appear to be based on the assumption that this phrase dilutes the rule's mandate for accessibility. This assumption is incorrect. DOT is committed to the goal of accessibility, but wants to make clear that it is not demanding that recipients make changes which are simply not feasible (e.g., changes for which technology is not available or changes which would cause a dangerous weakening of a structure).

Paragraph (b) requires certain buildings to conform to the requirement of physical accessibility in paragraph (d). If an alteration is made to a portion of a building the accessibility of which could be improved by the manner in

which the alteration is carried out, the alteration must be made in that manner. Thus, if a doorway is being altered, the doorway must be made wide enough to accommodate wheelchairs. On the other hand, if the alteration involves ceilings, the provisions of this section do not apply because this alteration cannot be done in a way that affects the accessibility of the building.

Paragraph (b) is based on the belief that alterations present opportunities to design and construct the altered portion or item in an accessible fashion. It should be noted that paragraph (b) applies only to the altered portion or item of a fixed facility. Thus, a stair renovation to meet the ANSI standard does not impose a requirement for elevator installation since an elevator is not within the scope of the stair alteration project. Paragraph (b) does not create the obligation to install an elevator in an existing fixed facility which has no elevator. The basic requirement in paragraph (b) is simply to take the opportunities afforded by the alteration and, to the maximum extent feasible, use the alteration to make the facility accessible. Thus, normal maintenance may take place in practically all cases without generating an accessibility requirement.

In sharp contrast to paragraph (b), the sections on specific mass transportation systems (§§ 27.85–27.93) effectively do require the installation of elevators or other level change mechanisms in fixed facilities which have no elevators. However, because of the transition plan requirement applicable to those sections, all of a system's fixed facilities (for example, all stations in a rapid rail system) are examined at once and a rational phasing can occur.

* * *

Appendix E—Memorandum of Points and Authorities in Support of the United States Department of Transportation's Motion to Participate as *Amicus Curiae* (Without Attachments)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EASTERN PARALYZED VETERANS ASSOCIATION OF PENNSYLVANIA INC. and JAMES J. PETERS,	)	
Plaintiffs	)	
v.	)	Civil Action No. 86-6797
DUDLEY R. SYKES and the CITY OF PHILADELPHIA,	)	
Defendants	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION'S MOTION TO PARTICIPATE AS *AMICUS CURIAE*

PRELIMINARY STATEMENT

Plaintiffs brought suit challenging, in part, the defendants' decision to delete an elevator shaft from the planned renovation of the Columbia Avenue subway station in Philadelphia. Plaintiffs allege, in part, that such action violates the United States Department of Transportation ("DOT") regulations, 49 C.F.R. Part 27, regarding the accessibility of mass transportation facilities for handicapped individuals. The Court has requested that DOT provide the Court with its interpretation of Subpart C of these regulations, 49 C.F.R. §§ 27.61 through 27.67, as they apply to the Columbia Ave-

nue subway station. Because of DOT's vital interest in ensuring that its regulations are interpreted correctly, the Department of Transportation seeks to participate in this action as an *amicus curiae.*

DOT REGULATIONS

In 1979, DOT enacted regulations entitled "Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefitting from Federal Financial Assistance."[1] 44 Fed. Reg. 31442 (1979) codified at 49 C.F.R. Part 27. The 1979 regulations were promulgated to comply with U.S. Department of Health, Education and Welfare coordination guidelines, issued in 1978, implementing Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 ("Section 504"). These HEW guidelines required that all recipients of federal funds integrate handicapped persons into the same programs available to others, rather than treat them as a separate group in "special" programs. *See* 43 Fed. Reg. 2132 (1978), 45 C.F.R. §§ 85.1-85.58 (1980). Subpart C of the 1979 DOT regulations, 49 C.F.R. Part 27 (1979), which dealt with the accessibility of facilities, stated that it:

> does not necessarily require a recipient to make each of its existing facilities or every part of an existing facility accessible to and usable by handicapped persons.

49 C.F.R. § 27.65(a).

However, Subpart C did require that:

> Each facility or part of a facility which is altered by, on behalf of, or for use of a recipient . . . in a manner that affects or could affect the accessibility of the facility or part of the facility shall, to the maximum extent feasible

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1. These regulations were enacted pursuant to Section 16(a) of the Urban Mass Transportation Act, 49 U.S.C. § 1612(a), Section 165(b) of the Federal-Aid Highways Act, 23 U.S.C. § 142 note and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. 44 Fed. Reg. 31442 (1979). These regulations superseded the 1976 Urban Mass Transportation Administration ("UMTA") regulations, codified at 49 C.F.R. Part 609. *Id.* at 31454.

> be altered in such a manner that the altered portion of the facility is readily accessible to and usable by handicapped persons.

49 C.F.R. 27.67(b)

Subparts D and E of these regulations imposed additional program specific requirements regarding the accessibility of facilities and services. Subpart D contained program specific requirements for airports, railroads and highways. Subpart E, which contained requirements pertaining to mass transportation, specifically required that stations within the rapid and commuter rail systems which served institutions of higher learning, such as the Columbia Avenue subway station[2] "must be accessible to wheelchair users." 44 Fed. Reg. 31442, 31478 (1979), codified at 49 C.F.R. 27.87(a)(1979).

One month after the 1979 regulations were promulgated, suit was filed challenging the validity of Subpart E of these regulations. *American Public Transit Association* v. *Goldschmidt*, 485 F. Supp. 811 (D.D.C. 1980, *rev'd*, 655 F.2d 1272 (D.C. Cir. 1981) ("*APTA*"). The D.C. Circuit, referring to the Supreme Court's decision in *Southeastern Community College* v. *Davis*, 442 U.S. 392 (1979), held that because Subpart E of DOT's regulations could be read to require extensive modifications of existing systems and impose extremely heavy financial burdens on local transit authorities, the regulations exceeded DOT's authority to enforce Section 504. *APTA*, *supra*, 655 F.2d at 1278, 1280. The D.C. Circuit remanded the case to DOT to allow DOT to ascertain whether Subpart E was also based on other enabling legislation. *Id.* at 1280.

In response to the court's remand, DOT published an interim rule in 1981 deleting Subpart E of 49 C.F.R. Part 27 and substituting a new section 27.77 in Subpart D. 46 Fed. Reg. 37488 (1981). This new section 27.77 did not impose any program specific requirements regarding mass transportation facilities but was limited to mass transportation services. *Id.*

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2. The Columbia Avenue subway station serves Temple University. *Disabled In Action* v. *Sykes*, Civil Action No. 86-2316 Memorandum Opinion, p. 1 (E.D. Pa. 1986), a copy of which is attached at Tab 1.

at 37492. This section established a system whereby recipients of federal funds could engage in "special efforts" to satisfy their obligations for promoting transportation services to handicapped individuals.[3] *Id.* The only modification to Subpart C was to delete any reference to Subpart E. *Id.* at 37492.

FACTS

From 1979 through 1986, the City of Philadelphia and the Southeastern Pennsylvania Transportation Authority[4] ("SEPTA") planned and completed a $5.3 million renovation of the Columbia Avenue subway station. *Disabled In Action* v. *Sykes,* Civil Action No. 86-2316, Memorandum Opinion, 1 (3d Cir. 1986), a copy of which is attached at Tab 1. The Urban Mass Transportation Administration ("UMTA"), an agency of DOT, provided $4.3 million in grants for the Columbia Avenue station renovation pursuant to Section 3 of the Urban Mass Transportation Act, 49 U.S.C. 1602. *Disabled In Action, supra,* Memorandum Opinion at 1 (attached at Tab 1). The proposal for the Columbia Avenue station renovation, which included the construction of an elevator shaft to service the northbound platform of the station, initially was submitted in 1978 and funding initially was approved in 1979. Preapplica-

3. For example, if recipients of federal funds certified that they had established paratransit services for wheelchair users and semi-ambulatory handicapped persons involving the expenditure of an average annual dollar amount equivalent to a minimum of 3.5 percent of the financial assistance received under section 5 of the Urban Mass Transit Act, 49 U.S.C. § 1604, they were deemed to be in compliance with Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, Section 16 of the Urban Mass Transit Act of 1964, 49 U.S.C. § 1612, and Section 165 of the Federal-Aid Highway Act of 1973, 23 U.S.C. § 142 note, with regard to making services accessible. 46 Fed. Reg. 37488, 37492-93 (1981), codified at 49 C.F.R. 27.77 (a)(1), (a)(4), Appendix A.

4. The City of Philadelphia owns the Broad Street Line, including the Columbia Avenue Station. SEPTA leases the City-owned trains and facilities, and is responsible for the possession, operation and maintenance of the Broad Street Line. The City planned the project in conjunction with SEPTA.

tion of the City of Philadelphia for a Mass Transportation Capital Improvement Grant under the Urban Mass Transportation Act for the Columbia Avenue Station Improvements Project, attached at Tab 2; Letter from Franz Gimmler, Regional Director, UMTA Region III to Robert Silver, Commissioner, Department of Public Property, dated August 13, 1979, attached at Tab 3.

In 1981, the City of Philadelphia requested UMTA's approval of the City's plan to delete the proposed elevator shaft at the Columbia Avenue subway station. Letter from Edward R. Videcki, Chief Transit Engineer to Joseph Mayer, Director, Office of Engineering, UMTA, dated November 9, 1981, attached at Tab 4. UMTA informed the City that:

> Since it is this Administration's view that the method of compliance with Section 504 of the Rehabilitation Act of 1973 is a matter of local preference and since the City has filed its certification of compliance with the "Special Efforts" requirements published in the federal register on July 20, 1981, your decision to make this change can be made without UMTA's approval.

Letter from Joseph Mayer, Director, Office of Engineering, UMTA to Edward Videcki, Chief Transit Engineer, City of Philadelphia, dated December 14, 1987, ("the 1981 UMTA letter") attached at Tab 5. In effect, UMTA stated that it need not approve the proposal as long as the requirements for accessibility of services in Subpart D of Part 27 were satisfied, thereby also meeting the requirements of Subpart C of Part 27, 49 C.F.R. § 27.67 by making the facilities accessible as well.[5]

Suit was then brought against the City of Philadelphia alleging, in part, that the City's failure to include elevators in the Columbia Avenue station as part of the renovation funded,

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5. The interpretation of the regulation advanced by UMTA is incorrect and did not reflect DOT's position. DOT's position has not changed. *See* discussion *infra*. However, the end result produced by the transmission of this information, the exclusion of an elevator shaft from the Columbia Avenue station, does not violate Subpart C. *See* discussion *infra*.

in large part, by UMTA violated 49 C.F.R. Part 27. *Disabled In Action* v. *Dudley Sykes,* Civil Action No. 86-2316 (E.D. Pa. 1986). Before a decision was issued in that suit, the present action was brought challenging the City's exclusion of an elevator and elevator shaft in the Columbia Avenue station. The court in *Disabled In Action, supra,* relying, in part, on the December 14, 1981 UMTA letter (attached at Tab 5), apparently determined that there was a conflict between Subparts C and D of 49 C.F.R. Part 27 and found that defendant, having complied with the program specific requirements of Subpart D, was under no obligation to comply with the general requirements of Subpart C. *Disabled In Action, supra,* Memorandum Opinion at 15-19, attached at Tab 1.

The Court in the present suit then requested the Department of Transportation to submit its interpretation of 49 C.F.R. Part 27 as it applied to the Columbia Avenue station. Letter from James D. Fornari, Jarblum, Soloman & Fornari, P.C. to Barry L. Molar, DOT, dated April 21, 1987, ("Fornari letter") a copy of which is attached at Tab 6.

ARGUMENT

I. THE UNITED STATES DEPARTMENT OF TRANSPORTATION SHOULD BE ALLOWED TO PARTICIPATE IN THIS ACTION AS AN *AMICUS CURIAE*

Although the standards for participation in an action as an *amicus curiae* are not well developed, such participation should be allowed if the issues in an action are important beyond the interests of the parties. 16 Wright, Miller, Cooper and Gressman, *Federal Practice and Procedure* § 3975 at 435 (1977). The present action meets this test. At issue in the present suit is the proper interpretation of DOT's own regulations. As the agency which promulgated these regulations, DOT's interpretation of these regulations should be controlling. *Brennan* v. *Western Union Telegraph,* 561 F.2d 477, 483 (3d Cir. 1977). DOT, therefore, has an essential interest in the proper interpretation of its regulations. In addition, the question concerning the proper interpretation of Subpart C of 49

C.F.R. Part 27 is not hypothetical—this case presents a concrete controversy regarding whether Subpart C, particularly 49 C.F.R. 27.67, requires installation of an elevator to the Columbia Avenue subway station since the station was renovated with federal monies. In light of DOT's responsibilities with regard to its own regulations, the Court would be well served by the participation of DOT as an *amicus curiae*. Further, the Court itself has requested DOT to provide its interpretation of Subpart C, 49 C.F.R. 27.61 through 27.67. *See* Fornari letter, attached at Tab 6.

II. SUBPARTS C AND D OF 49 C.F.R. PART 27 ESTABLISH SEPARATE, INDEPENDENT CRITERIA AND, IN ORDER TO COMPLY WITH DOT REGULATIONS AND SECTION 504 OF THE REHABILITATION ACT, THE REQUIREMENTS SET FORTH IN BOTH SUBPARTS MUST BE SATISFIED

As set forth previously, Subpart C of 49 C.F.R. Part 27 established general requirements regarding the accessibility of facilities. In the 1979 regulation, this Subpart was modified by Subparts D's and E's more specific program requirements. Subpart D established program specific requirements for highways, railroads and airports. 44 Fed. Reg. 31442, 31474 (1979). Subpart E established program requirements for rapid rail services and other forms of mass transportation. *Id.* at 31477. These program specific criteria established requirements regarding the accessibility of both facilities and services for each transportation mode.

Under the 1979 regulation, as well as the 1981 regulation, recipients of federal funds are required to make both transportation facilities and transportation services accessible to the handicapped. When the 1981 regulation was published, deleting Subpart E, the program specific requirements with regard to accessibility of facilities for modes of mass transportation, including rapid rail, were eliminated. However, the more general program requirements concerning the accessibility of facilities of all transportation modes, including

mass transit, set forth in Subpart C, were not diminished in any way.

The 1981 regulations did amend the specific program requirements concerning accessibility of services for mass transit, by replacing Subpart E with paragraph 27.77 in Subpart D. Paragraph 27.77 did not require, as had Subpart E, that mass transportation services be made fully accessible. Rather, it required that recipients of federal funds certify that "special efforts . . . to provide transportation that handicapped persons, including wheelchair users and semi-ambulatory persons, can use" were being made. 46 Fed. Reg. 37488, 37492 (1981), codified at 49 C.F.R. 27.77(a)(1). Subparagraph (a)(4) of 27.77 stated, however, that:

> compliance with such certification shall be deemed to constitute compliance with section 504 of the Rehabilitation Act of 1973, section 16(a) of the Urban Mass Transportation Act of 1964, as amended, and section 165(b) of the Federal-Aid Highway Act of 1973, *insofar as these statutes relate to the provision of mass transportation service* that handicapped persons can use.

46 Fed. Reg. 37488, 37492 (1981), codified at 49 C.F.R. 27.77(a)(4) (emphasis added). In the section of the preamble to the 1981 regulations explaining 27.77, DOT further clarified this point stating that:

> compliance with the certification under this subsection shall be deemed compliance with section 504, section 16, and section 165. Compliance in this context refers only to compliance with the obligation of recipients to ensure the provision of transportation *service* that handicapped persons can use (and planning for such transportation). *The certificate does not stand for compliance with other requirements. . . .*

46 Fed. Reg. 37488, 37490 (1981) (emphasis added).

DOT's intention is clear—compliance with 49 C.F.R. 27.77, regarding accessibility of transportation services, does not release federal fund recipients from compliance with Sub-

part C's requirements regarding the accessibility of transportation facilities.

This Court, in *Disabled In Action, supra,* reached a contrary conclusion, based upon its interpretation of the requirement, in Subpart C, that "[t]he provisions of this subpart should be interpreted in a manner that will make them consistent with the provisions of subparts D and E. In the case of apparent conflict, the provisions of subparts D and E shall prevail." 44 Fed. Reg. 31442, 31473 (1981), codified at 49 C.F.R. 27.61.[6] However, this language referred to conflicts between the subparts requirements with regard to facilities, not services. For example, if, in the context of a question concerning the accessibility of rapid rail transit, a conflict were to arise between Subpart C's more general requirements with regard to accessibility of airport facilities and Subpart E's more specific requirements with regard to accessibility of facilities, Subpart C provided that the provisions in Subpart E would prevail.[7] 44 Fed. Reg. 31442, 31448, 31473 (1979). Likewise, if, in the context of a question concerning the accessibility of an airport terminal, a conflict were to arise between Subpart C's more general requirements with regard to accessibility of facilities and Subpart D's more specific requirements with regard to accessibility of facilities, Subpart C provided that the provisions in Subpart D would prevail. *Id.* In short, for a conflict between the Subparts to arise, the dispute must involve a question regarding accessibility of facilities, not services.[8]

In response to the D.C. Circuit's ruling in *APTA, supra*, DOT deleted Subpart E, replacing it with a new paragraph 27.77 in Subpart D. 46 Fed. Reg. 37488, 37489 (1981). Para-

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6. The Court also apparently relied upon UMTA's erroneous interpretation of this regulation, set forth in the UMTA letter, attached at Tab 5. *See Disabled In Action, supra,* Memorandum Opinion, p. 8 (attached at Tab 1).

7. Such a conflict concerning accessibility of mass transportation facilities could only arise, however, prior to the 1981 regulation deleting Subpart E.

8. It was not possible to have a conflict between Subpart C and Subparts D and E regarding accessibility of services since Subpart C did not address accessibility of services. *See* 49 C.F.R. §§ 27.61 through 27.67.

graph 27.77 simply established program specific requirements for accessibility of services for the handicapped. *Id.* at 37492. This action effectively eliminated any specific program requirements regarding accessibility of facilities for mass transportation modes, such as rapid rail services, which originally were addressed in Subpart E. Under the 1981 regulations, the only "conflict," as that term is used in Subpart C, which could then arise, which would require resolution by deference to Subpart D, involves disputes concerning the accessibility of facilities in airports, railroads and highways, i.e., those specific transportation modes covered by Subpart D.[9]

It is clear that Subparts C and D of DOT's regulation, 49 C.F.R. Part 27, established separate, independent criteria for compliance with the regulation, and both sets of requirements must be satisfied.

III. SUBPART C OF 49 C.F.R. PART 27 DOES NOT REQUIRE INSTALLATION OF AN ELEVATOR TO THE COLUMBIA AVENUE STATION

Subpart C of the 1979 and 1981 regulations does not require installation of an elevator to an existing fixed facility

9. An anamolous situation was created by revocation of Subpart E without substantive modification of Subpart C. Subpart C requires that facilities which provide access to mass transportation services be made accessible under certain circumstances without a concomitant requirement that the services themselves be made accessible. However, the Architectural Barriers Act of 1968, as amended, 42 U.S.C. 4151 *et seq.*, ("the Barriers Act") and the regulations promulgated thereunder by the General Services Administration ("GSA"), 41 C.F.R. Subpart 101-19.6, prescribe accessibility standards for the design, construction and alteration of "buildings." See 44 Fed. Reg. 31442, 314590 (1979). New fixed facilities and alterations to existing fixed facilities which are funded by a grant or loan from DOT must comply with the GSA regulation. *Id.* DOT intended that 49 C.F.R. 27.67 reflect the basic requirement of GSA's regulation. 44 Fed. Reg. 31442, 31450 (1979). Therefore, DOT retained Subpart C's requirement that those portions of mass transportation facilities that are undergoing renovation must be made accessible to the maximum extent feasible. *See* 49 C.F.R. 27.67(b).

which does not already have an elevator, such as the Columbia Avenue subway station. However, Subpart E of the 1979 regulations did require installation of an elevator to the Columbia Avenue subway station. When Subpart E was deleted in 1981, defendants were no longer under any obligation pursuant to 49 C.F.R. Part 27 to include an elevator in the renovated structure.

When the final rule implementing the 1979 regulation was published in the Federal Register, the preamble explained the interplay of Subpart C and Subpart E. DOT then explained that 49 C.F.R. Subpart C:

> is based upon the belief that alterations [to buildings or portions of buildings] present opportunities to design and construct the altered portion or item in an accessible fashion. It should be noted that [49 C.F.R. 27.67(b)] applies only to the altered portion or item of a fixed facility. Thus, a stair renovation to meet the ANSI standard [American National Standards Institute] does not impose a requirement for elevator installation since an elevator is not within the scope of the stair alteration project. [49 C.F.R. 227.67(b)] *does not create the obligation to install an elevator in an existing fixed facility which has no elevator.* . . . In sharp contrast to [49 C.F.R. 27.67(b)], the sections on specific mass transportation systems [Subpart E] effectively do require the installation of elevators or other level change mechanisms in fixed facilities which have no elevators.

44 Fed. Reg. 31442, 31449 (1979) codified at 49 C.F.R. Part 27. DOT clearly stated in the regulation's preamble that, while Subpart E required installation of an elevator to renovated rapid rail facilities, Subpart C, by itself, did not. Consequently, when DOT deleted Subpart E, it removed the obligation to add elevators when renovating existing fixed facilities.

Plaintiffs allege, however, that the 1971 ANSI standard, which is incorporated by reference into Subpart C, 49 C.F.R.

27.67(d),[10] requires that whenever a subway station is altered, it must be made fully accessible. Plaintiffs' Cross-Motion For Partial Summary Judgment, pp. 19-22. Plaintiffs' argument is based upon a very broad interpretation of the phrase "entrance" as it is used in the ANSI standard.

Section 5.2 of the 1971 ANSI standard, suggested that—

> 5.2.1 At least one primary entrance to each building shall be usable by individuals in wheelchairs.

The ANSI standard does not define the term "entrance to a building." However, Section 5.2.2 of the ANSI standard states that:

> 5.2.2 At least one entrance usable by individuals in wheelchairs shall be on a level that would make the elevators accessible.

Nothing in the ANSI standard suggests that, in the context of a subway station, the stairs or escalators inside a facility leading to the street level be considered an "entrance" for purposes of applying section 5.2. Indeed, the specific reference to elevators in section 5.2.2 indicates that elevators were not considered as part of an "entrance" to a facility.

Further, as stated previously, the preamble to the 1979 DOT regulation stated that when renovating a facility, 49 C.F.R. 27.67(b):

> applies only to the altered portion or item of a fixed

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10. Subparagraph 27.67(d) of DOT's regulation states that:

> Design, construction or alteration of fixed facilities in paragraphs (a) and (b) of this section shall be in accordance with the minimum standards in the "American National Standard Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped," published by ANSI, Inc. (ANSI A117.1-1961 (R1971)), which is incorporated by referenced in this part.

29 C.F.R. 27.67(d). This regulation refers to the 1971 ANSI standard. The ANSI standard was revised in 1981. [ANSI A117.1-1980]. DOT was aware of the proposed changes to the ANSI standard as early as 1979. *See* 44 Fed. Reg. 31442, 31449 (1979). However, in the 1981 amendments to 49 C.F.R. Part 27, DOT chose not to amend 27.67(d) to incorporate the 1980 ANSI standards.

> facility. Thus, a stair renovation to meet the ANSI standard does not impose a requirement for elevator installation since an elevator is not within the scope of the stair alteration project. Paragraph (b) does not create the obligation to install an elevator in an existing fixed facility which has no elevator.

44 Fed. Reg. 31442, 31449 (1979). It would be inconsistent to read into subparagraph 27.67(d) a requirement so broad that installation of an elevator would be required when renovating an existing fixed facility which has no elevator when the very preamble to that same paragraph explicitly stated the opposite.

In addition, virtually all rapid rail stations' entrances consist of some means of vertical access, be it staircases or escalators. Therefore, to adopt the broad reading of the term "entrance" propounded by plaintiffs would require that whenever a means of vertical access in a rapid rail station was being renovated, an elevator would have to be installed. Such a sweeping "exception" for rapid rail stations, if intended, would be expressly set forth. Rather, the more reasonable interpretation, and that adopted by DOT, requires that when renovating a means of access, such as a staircase, then the staircase must comply with the ANSI staircase standard, but the ANSI standard, as incorporated into DOT's regulations, do not require inclusion of an elevator shaft to an existing, fixed subway station which does not already have an elevator.

Moreover, adopting plaintiffs' interpretation of 49 C.F.R. 27.67(d) as requiring installation of elevators at subway "entrances" is inconsistent with the requirements of, and fundamental differences between, Subpart C and Subpart E in the 1979 regulations. DOT required retrofitting subway stations with elevators in Subpart E, not Subpart C. *See* 44 Fed. Reg. 31442, 31449, 31473-74, 31478 (1979). Subpart C was intended to achieve a less burdensome goal, i.e., to assure that specific renovations, such as stair renovations, met the ANSI standard so that the stairs could be used by ambulatory handicapped and elderly individuals. To interpret Subpart C other-

wise would be inconsistent with the D.C. Circuit's decision in *APTA, supra,* which remanded Subpart E of the 1979 regulation to DOT because it found Subpart E's requirements to be too burdensome. The *APTA* court held that Subpart E of the regulations:

> require extensive modifications of existing systems and impose extremely heavy financial burdens on local transit authorities . . . elevators and other modifications must be added to existing subways. The regulations themselves recognize that some changes will be 'extraordinarily expensive'; such changes are nevertheless required. . . . These are the kind of burdensome modifications that the Davis Court [*Southeastern Community College* v. *Davis,* 422 U.S. 397 (1979)] held to be beyond the scope of section 504.

APTA, supra, 655 F.2d at 1278. While the D.C. Circuit was discussing the retrofitting requirement of Subpart E, the same analysis applies in the present situation. Under plaintiffs' interpretation of the ANSI standard, whenever a "primary entrance" to a subway is being modified, the financially burdensome task of installing an elevator shaft to a preexisting fixed subway station which had no elevator, must be undertaken. Clearly, DOT's regulations do not require this. Rather, DOT's 1979 and 1981 regulations, as applied to the Columbia Avenue subway station, did not require that an elevator and elevator shaft be included when renovating the subway station.

IV. THE ARCHITECTURAL BARRIERS ACT AND THE REGULATIONS PROMULGATED THEREUNDER ALSO ESTABLISH ACCESSIBILITY STANDARDS FOR THE DESIGN, CONSTRUCTION AND ALTERATION OF BUILDINGS FUNDED WITH FEDERAL MONIES.

The foregoing analysis does not address the question of the application of the Architectural Barriers Act of 1968, as amended, 42 U.S.C. 4151, *et seq.*, (the "Barriers Act") and the

regulation promulgated by the General Services Administration ("GSA") thereunder, 41 C.F.R. Subpart 101-19.6 (the "GSA Barriers Act regulation") to this Columbia Avenue station renovation. This regulation is pertinent because it established accessibility standards for the design, construction and alteration of buildings funded with federal financial assistance. *Id.* The GSA regulation was revised in 1980 and 1984 and its application to the Columbia Avenue project would turn on the extent of the construction and alteration of the station each time the regulation was revised. These revisions to the regulation were published in 45 Fed. Reg. 67664 (1980), codified at 41 C.F.R. 101-19.603 (1981) and 49 Fed. Reg. 31528 (1984), codified at 41 C.F.R. 101-19.603.[11]

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11. GSA and the Architectural and Transportation Barriers Compliance Board (the "Barriers Board"), as the entity responsible for enforcing the GSA Barriers Act regulation, 29 U.S.C. 762, are the appropriate entities to respond to inquiries regarding the interpretation of the GSA Barriers Act regulation and the specific application of this regulation to the Columbia Avenue subway station. The Barriers Board has established an administrative review mechanism for determining whether particular renovations are in compliance with the GSA Barriers Act regulation. 36 C.F.R. Part 1150. GSA does not have a similar mechanism.

CONCLUSION

For the foregoing reasons, the United States Department of Transportation's Motion To Participate As Amicus Curiae should be granted, and the Court should adopt DOT's interpretation of 49 C.F.R. Part 27 as controlling.

Respectfully submitted,

RICHARD K. WILLARD
Assistant Attorney General

EDWARD S. G. DENNIS, JR.
United States Attorney

/s/
RICHARD GREENBERG

OF COUNSEL:

BARRY L. MOLAR
Trial Attorney
Office of Assistant
General Counsel
for Litigation
U.S. Department of
Transportation

/s/
KATHLEEN S. DEVINE

Attorneys
U.S. Department of Justice
Civil Division—Room 3339
10th & Pennsylvania Ave., N.W.
Washington, D.C. 20530
Tel: (202) 633-4263

Attorneys for United States
Department of Transportation